

# **INTELLECTUAL PROPERTY AND INDIGENOUS RIGHTS**

## **PACIFIC SCIENCE CONFERENCE**

### **AT UNIVERSITY OF NEW SOUTH WALES**

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#### **LAW AND PROPERTY**

PRIOR TO THE REFORMATION OF HENRY THE VIII (ENGLAND EARLY 16<sup>TH</sup> CENTURY) ENGLISH COMMON LAW WAS KNOWN AS "NATURAL LAW" WHICH WAS BASED ON THE PREMISE THAT MAN IS NOT DESIGNED TO BEHAVE IN ANY WAY THAT HE CHOOSES, BUT HAS A NATURE TO WHICH HE SHOULD CONFORM. THEREFORE THE PURPOSE OF LAW WAS TO ENSURE THAT MAN CONFORMS TO THIS NATURE WHICH INVOLVES STANDARDS OF MORALITY, JUSTICE AND REASON WITH A HEAVY EMPHASIS ON THE SPIRITUAL AND RELIGIOUS TEACHINGS OF THE TIME.

ANCIENT WRITS OR CAUSES OF ACTION IN ENGLAND DISTINGUISHED BETWEEN REAL AND PERSONAL PROPERTY WHERE REAL PROPERTY INCLUDED INTEREST

IN LAND, WITH OTHER INTERESTS IN PROPERTY TERMED PERSONAL. FROM THIS AND OTHER SOURCES WE DEDUCE THAT THE UNDERLYING FOUNDATION OF ENGLISH LAW IS THE LAW OF PROPERTY. (FOR EXAMPLE, UNTIL RELATIVELY RECENTLY, THE LAW DEALING WITH RAPE WAS NOT CONSIDERED AN ASSAULT, BUT WAS A “PROPERTY” OFFENCE WITH THE HUSBAND USUALLY BRINGING AN ACTION IN DAMAGED GOODS).

THE LAST OF THE NATURAL LAWYERS, SIR WILLIAM BLACKSTONE WAS GIVING LECTURES ON LAW AT OXFORD IN THE 1760s WHEN A PRECOCIOUS 15 YEAR OLD STUDENT, JEREMY BENTHAM, LISTENING TO HIS STATEMENTS ON THE MORALITY, JUSTICE AND REASON OF LAW STRONGLY OBJECTED. BENTHAM SAID THAT LAW IS SIMPLY WHAT THE LAW MAKERS SAYS IT IS, AND HAS NO HIGHER MEANING, THOUGH HE MAY HAVE WISHED IT TO HAVE A HIGHER PURPOSE.

FROM THIS CONCEPT OF “POSITIVISM” THE ENGLISH LAW HAS DEVELOPED AND EVENTUALLY CAME TO AUSTRALIA WITH THE DOUBLE TENETS OF BEING BASED ON THE LAW

OF PROPERTY AND GIVING IMMENSE POWER TO  
LEGISLATORS TO DETERMINE THE RULES THAT GOVERN  
OUR SOCIETY.

WHEN THE ENGLISH INVADED AUSTRALIA IN 1788 THE  
ABORIGINES WERE NOT ACKNOWLEDGED AS POSSESSORS  
OF THE CONTINENT WITHIN THE TERMS OF ENGLISH LAW.  
THE EARLY SETTLERS AND CONVICTS, WHO HAD BEEN  
BROUGHT UP ON THE CONCEPT OF PRIVATE AND  
ABSOLUTE OWNERSHIP OF LAND, COULD NOT  
UNDERSTAND THE ABORIGINAL RELATIONSHIP WITH THEIR  
COUNTRY. SUCH A FEELING WAS ECHOED IN THE  
AUSTRALIAN CONSTITUTION. SECTION 127 OF THE  
CONSTITUTION ORIGINALLY SAID:

“IN RECKONING THE NUMBERS OF THE PEOPLE  
OF THE COMMONWEALTH, OR OF A STATE OR  
OTHER PART OF THE COMMONWEALTH,  
ABORIGINAL NATIVES SHALL NOT BE COUNTED”.

AS WE NOW KNOW THAT SECTION WAS REPEALED IN 1967  
AND THE CONSTITUTION WAS FURTHER AMENDED TO

PROVIDE THAT THE POWER OF THE COMMONWEALTH TO LEGISLATE FOR PEOPLE OF ANY RACE FOR WHOM IT WAS DEEMED NECESSARY TO MAKE SPECIAL LAWS SHOULD INCLUDE THE ABORIGINAL RACE.

THIS CLEARED THE WAY FOR COMMONWEALTH LEGISLATION ON ABORIGINES WHICH COULD ARGUABLY INCLUDE THE IMPLEMENTATION OF ABORIGINAL LAW. BUT IN 1999, POST LAW REFORM COMMISSION REPORTS ON THE RECOGNITION OF ABORIGINAL CUSTOMARY LAW AND THE HIGH COURT DECISIONS IN MABO AND WIK, WE HAVE YET TO FUNDAMENTALLY RECOGNISE ABORIGINAL CUSTOMARY LAW WITHIN OUR LEGAL SYSTEM.

ONE OF THE PRIME REASONS FOR THIS IS, IN MY VIEW, THE DIFFERENT WAY THAT THOSE LEGAL SYSTEMS, ENGLISH AND ABORIGINAL, VIEW PROPERTY.

IN AN INCREDIBLY SIMPLISTIC WAY, ENGLISH LAW VIEWS PROPERTY IN TERMS OF DEGREES OF OWNERSHIP AND ABORIGINAL CUSTOMARY LAW VIEWS PROPERTY IN TERMS OF RESPONSIBILITY.

THIS PHILOSOPHICAL DIFFERENCE IS, AGAIN IN MY VIEW, CENTRAL TO THE DEBATE ABOUT INTELLECTUAL PROPERTY LAW AND INDIGENOUS RIGHTS.

### **INDIVIDUAL VERSUS COMMUNAL RIGHTS**

MUCH OF WHAT WE HAVE DISCUSSED TODAY CONCERNS THE APPLICATION OF “WESTERN” LEGAL CONCEPTS OF PROPERTY, BE IT INTELLECTUAL OR OTHERWISE. THE DEVELOPMENT OF INTELLECTUAL PROPERTY LAW AS WE HAVE HEARD HAS BEEN LARGELY BASED ON THE CONCEPT OF OWNERSHIP AND THE RIGHTS TO EXPLOITATION.

THIS CAN BE IN DIRECT CLASH WITH INDIGENOUS LAW WHICH IS NOT BASED ON EITHER INDIVIDUAL “OWNERSHIP” NOR ON THE CONCEPT OF EXPLOITATION, THOUGH, THAT IS NOT TO SAY THAT INDIGENOUS GROUPS ARE NOT INTERESTED IN MARKETING ASPECTS OF WHAT MIGHT BE CALLED INDIGENOUS CULTURE, EITHER ARTISTIC OR

KNOWLEDGE-BASED IN RELATION TO, FOR EXAMPLE,  
PHARMACEUTICALS AND OTHER PRODUCTS.

AND A FUNDAMENTAL PROBLEM EXISTS WITH THE FOCUS  
ON THE TERM "RIGHTS".

SINCE THE 1960s MOST HUMAN RIGHTS LEGISLATION IN  
THE WESTERN WORLD HAS BEEN RIGHTS-BASED.

LEGISLATION HAS BEEN PASSED TO RECOGNISE OR  
CREATE RIGHTS FOR INDIVIDUALS, AND IN THE ODD  
EXCEPTION GROUPS, TO SUCH ISSUES AS EMPLOYMENT  
WITHOUT DISCRIMINATION, HOUSING, TRANSPORT,  
VOTING, ACCESS TO GOODS AND SERVICES AND  
EDUCATION. HOWEVER, RIGHTS-BASED LEGISLATION HAS  
SEVERAL FUNDAMENTAL LIMITATIONS:

1. IT REQUIRES INDIVIDUALS TO BRING A COMPLAINT OR  
ACTION WHEN THE RIGHTS HAVE BEEN IGNORED,  
OVERRIDDEN OR TRAMMELLED.

2. SUCH A RIGHTS-BASED APPROACH IMPLIES THE REQUIREMENT TO EXERCISE A RIGHT RATHER THAN RECOGNISING AN INHERENT NEED.

THE FIRST AND MOST OBVIOUS CONCERN IS THAT MANY INDIVIDUALS, PARTICULARLY DISADVANTAGED MEMBERS OF OUR COMMUNITY ARE UNABLE OR UNWILLING TO MAKE A COMPLAINT OR TAKE AN ACTION WHERE THEIR RIGHTS ARE UNDER THREAT.

AN ADDITIONAL PROBLEM EXISTS WHERE MOST SUCH LEGISLATION PROVIDES INDIVIDUAL REMEDIES, THEY ARE IMPERFECT IN PROVIDING SYSTEMIC REMEDIES OR ANSWERS TO FUNDAMENTAL SOCIETAL CONCERNS.

PERHAPS WHAT IS NEEDED IS NEEDS-BASED LEGISLATION WHICH RECOGNISES BASIC HUMAN REQUIREMENTS WHICH IF WELL DEFINED AND WIDELY RECOGNISED IN THE COMMUNITY WOULD GIVE WHOLE COMMUNITIES A ROLE IN DEMANDING THAT THE NEEDS OF ITS MEMBERS BE MET.

THIS WOULD BETTER ENCOURAGE COMMUNITIES TO PLAY A MORE ACTIVE ROLE THAN HAS BEEN THE CASE IN THE PAST IN RELATION TO PROTECTING INDIVIDUALS IN OUR SOCIETY, AS WELL AS THE ENVIRONMENT WITHIN WHICH WE LIVE. THIS IN TURN WOULD SUPPORT THE INTER-CONNECTIVENESS OF THE NEED FOR SUSTAINABILITY IN ENVIRONMENTAL TERMS AS WELL AS ECONOMIC AND SOCIAL TERMS.

I WILL RETURN TO THIS IN MY CONCLUSION.

## **BIODIVERSITY AND EXPLOITATION OF PHARMACEUTICALS**

IN HIS EARLIER PAPER, JOHN MERSON GAVE A NUMBER OF EXAMPLES OF HOW INDIGENOUS CULTURES AND STATES HAVE BEEN AFFECTED BY DISCOVERIES OF POTENTIALLY COMMERCIALY EXPLOITABLE PHARMACEUTICALS WITHIN THEIR BOUNDARIES.

WHILE, AS HAS BEEN STATED, THIS RAISES IMMENSELY DIFFICULT QUESTIONS OF LAW OF OWNERSHIP, AND



RIGHTS TO EXPLOITATION, IT ALSO BRINGS AN ACUTE FOCUS ON CONCERNS THAT HAVE BEEN RAISED ABOUT THE INABILITY OF “WESTERN” LAWS TO PROTECT INDIGENOUS CULTURES. THIS HAS ALSO BEEN ECHOED BY MS JACKSON AND MR ANDREWS.

NOT ONLY DO COPYRIGHT, TRADEMARK AND OTHER INTELLECTUAL PROPERTY LAWS NOT GENERALLY RECOGNISE COLLECTIVE OWNERSHIP, THEY DO NOT RECOGNISE SITUATIONS WHERE INDIGENOUS POPULATIONS MAY NOT WISH FOR THEIR WISDOM TO BE EXPLOITED AND SOLD. IN OTHER WORDS, EXISTING INTELLECTUAL PROPERTY RIGHTS DO NOT PROTECT INDIGENOUS CULTURE FROM EXPLOITATION.

THIS BRINGS UP A FURTHER CONUNDRUM: TO WHAT EXTENT SHOULD PEOPLE BE ALLOWED TO RETAIN INDIGENOUS CULTURAL WISDOM IN SITUATIONS WHERE ITS WIDESPREAD APPLICATION COULD SAVE HUNDREDS, THOUSANDS OR MILLIONS OF LIVES? WHICH SEEMS TO GIVE RISE TO THE ADDITIONAL QUESTION OF HOW THE KNOWLEDGE OF THIS WISDOM BECAME KNOWN TO

OTHERS OUTSIDE THE INDIGENOUS GROUP IN THE FIRST PLACE.

HERE WE SEE A NEXUS BETWEEN INDIGENOUS RIGHTS TO LAND, INCLUDING VETOS OVER MINING AND COMMERCIAL PHARMACEUTICAL EXPLORATION.

AND HOW CAN WHAT HAS REFERRED TO AS BIO PIRACY BE CONTROLLED? IF IT IS POSSIBLE TO “STEAL” GENETIC MATERIAL WHICH CAN BE HIDDEN MICROSCOPICALLY FOR REPRODUCTION ELSEWHERE, IS IT POSSIBLE TO PROTECT THE SOURCE? CAN LAWS BE FRAMED (IN EXTENSION OF EXISTING ONES) WHERE GENETIC MAPPING CAN OCCUR TO PINPOINT THE LOCATION OF ORIGIN AND THEREFORE PROTECT THAT LOCATION?

BUT IF THE MAIN CONCERN OF INDIGENOUS GROUPS IS PROTECTION FROM CULTURAL DESTRUCTION, THEN ISN'T THE QUESTION REALLY WHAT IMPACT THE DISCOVERY AND EXPLOITATION OF INDIGENOUS CULTURAL WISDOM HAS ON THE SUBJECT CULTURE.

IN OTHER WORDS, IF THE EXPLOITATION OF AN ANALGESIC BARK FROM A TREE IN THE NORTHERN TERRITORY HAS LITTLE OR NO EFFECT ON THE INDIGENOUS POPULATION AND ITS CULTURE THAT EXISTS IN THE AREA OF ITS DISCOVERY, SHOULD EXPLOITATION OF THAT PRODUCT BE BANNED? IT WOULD BE ONE THING IF EXPLOITATION REQUIRED THE CONSUMPTION OF LARGE AMOUNTS OF THE BIOLOGICAL MATERIAL EXISTING IN TREES, SHRUBS OR PLANTS WHICH PLAY AN IMPORTANT ROLE IN AN INDIGENOUS CULTURE, IN DISTINCTION FROM A SITUATION WHERE A SMALL AMOUNT OF GENETIC MATERIAL COULD BE OBTAINED AND PERHAPS GROWN ELSEWHERE FOR EXPLOITATION WITH ROYALTIES GOING BACK TO THE ORIGINAL COMMUNITY.

AGAIN, THIS PRESENTS A CLASH BETWEEN THE UNDERLYING PHILOSOPHY OF "WESTERN" LAW AND INDIGENOUS LAW.

**SHOULD TERM VERSUS LONG TERM PLANNING**

TO MAKE MATTERS WORSE, THE GOVERNMENT PLANS AND LEGISLATES FOR THE SHORT TERM. LONG TERM PLANNING IS VERY RISKY, AND OFTEN DOES NOT DELIVER A “RETURN” WITHIN THE TIMEFRAME OF A PARTICULAR GOVERNMENT’S SURVIVAL WINDOW (3 TO 4 YEARS).

BUREAUCRACIES IN MOST WESTERN (AS WELL AS EASTERN) SOCIETIES INCREASINGLY EXIST TO SERVE GOVERNMENTS, AND NOT THE COMMUNITIES THAT THEY ARE SUPPOSEDLY IN PLACE TO SERVE.

GOVERNMENTS IN THE WESTERN WORLD ARE BECOMING DESPERATE ABOUT ATTRACTING A SMALL NUMBER OF SWINGING VOTERS TO SUPPORT THEM WITH THE RESULT THAT MUCH GOVERNMENT PLANNING IS DIRECTED AT A SMALL PERCENTAGE OF “SWINGING” VOTERS WHO ARE OFTEN THE MOST ILL-INFORMED AND SELF-CENTRED MEMBERS OF SOCIETY.

SO WHAT IS THE CHANCE OF DEVELOPING GOVERNMENT INITIATIVES TO ADDRESS THE OVERWHELMING NEED FOR SUSTAINABILITY IN ALL ITS ASPECTS TO PRESERVE OUR

HERITAGE FOR FUTURE GENERATIONS, WHEN WE EXIST IN  
A CONSUMER DRIVEN SOCIETY CONTROLLED BY THE  
SELFISH?

## **THE SHIFT FROM AGRICULTURAL TO INDUSTRIAL TO AN INFORMATION SOCIETY**

AND THE GOVERNMENTAL APPROACH IS OCCURRING IN  
THE FACE OF MASSIVE ECONOMIC AND SOCIETAL CHANGE.

IN A PERIOD OF LESS THAN TWO CENTURIES THE  
PERCENTAGE OF THE WORKFORCE DIRECTLY INVOLVED IN  
AGRICULTURAL PRODUCTION FELL FROM NEARLY 90  
PERCENT IN THE PRE-INDUSTRIAL SOCIETY TO AS LOW AS  
A FEW PERCENT IN THE MOST TECHNOLOGICALLY  
ADVANCED NATIONS. (HARMAN AND HORMANN)

AROUND 1950 THE UNITED STATES (AND WITH IT MUCH OF  
THE “WESTERN WORLD”) BECAME A MASS CONSUMPTION  
SOCIETY (JOHN MYNARD KEYNES IN 1930 PROFFERED  
THAT TO REMAIN A PRODUCTION-BASED SOCIETY WE

NEEDED TO BECOME A CONSUMPTION SOCIETY).

FRUGALITY NO LONGER WAS A PRIME VIRTUE IN SOCIETY.

CONSUMPTION BECAME THE NEW ETHIC (WE NOW SPEAK OF CONSUMERS NOW RATHER THAN CUSTOMERS, CLIENTS OR EVEN CITIZENS).

EFFORTS TO CREATE FULL EMPLOYMENT SPRANG UP IN THE INDUSTRIAL WORLD AFTER THE SECOND WORLD WAR, WITH A BOOST IN THE 1950s BY THE ARMS RACE AND SUBSEQUENT MARKET FOR ARMS.

AND THE INFORMATION SOCIETY IS NOW PROFFERED AS THE NEXT SAVIOUR.

WHAT DO YOU DO WHEN THE PRODUCTIVENESS OF THE ECONOMY HAS RISEN TO WHERE THE NEEDS OF SOCIETY CAN BE MET BY EMPLOYING ONLY A FRACTION OF THE POTENTIAL WORKFORCE?

ANSWER:            BECOME OBSESSED WITH CONSUMPTION TO TRY TO USE UP THE PRODUCT AND KEEP THE MACHINERY RUNNING.

QUESTION: WHAT DO YOU DO WHEN TECHNOLOGY HAS ADVANCED TO WHERE ANYTHING YOU CAN TRAIN A HUMAN TO DO YOU CAN TRAIN A COMPUTER TO DO, AND FURTHERMORE THE COMPUTER WILL PROBABLY DO IT BETTER, FASTER AND CHEAPER?

ANSWER: BECOME OBSESSED WITH ECONOMIC GROWTH TO CREATE NEW JOBS FOR HUMANS TO DO.

QUESTION: AND WHAT WILL CREATE THAT CONSUMPTION, AND THAT GROWTH?

ANSWER: INFORMATION

PERHAPS INSTEAD OF AN INFORMATION SOCIETY WE SHOULD CALL IT A "MAKE WORK" SOCIETY. (HARMAN)

THIS DOUBLE BOGEY OF ENTRENCHING THE PURPORTED NEED FOR CONSTANT ECONOMIC GROWTH AND FULL OR LOW LEVELS OF UNEMPLOYMENT WITHIN WESTERN ECONOMIES IS SIMPLY UNSUSTAINABLE AND NOT ONLY

SPELLS DOOM FOR OUR ENVIRONMENT, BUT ALSO FOR  
INDIGENOUS CULTURE AND WISDOM.

## **CONCLUSION**

### **BRINGING BACK VALUE**

I BELIEVE THAT WE ARE IN THE MIDST OF A MAJOR CHANGE WHICH IS AFFECTING THE ENTIRE INDUSTRIALISED WORLD AND INVOLVES A QUESTIONING OF MANY OF THE UNDERLYING PREMISES UPON WHICH OUR SOCIETY SEEMS TO DEPEND, AT LEAST IN THE POST-WORLD WAR II ERA.

INCREASING NUMBERS OF PEOPLE ARE QUESTIONING THE VALUES THAT ARE LEADING TO THE RAPID DESTRUCTION OF OUR ENVIRONMENT AND ARE BEGINNING TO SEE THE INTER-RELATEDNESS BETWEEN THOSE VALUES AND A RANGE OF OTHER ISSUES SUCH AS THE DEVELOPMENT OF A CONSUMER SOCIETY, THE LACK OF SATISFACTION MANY HAVE WITH WORK AND THE DESIRE TO IMPROVE LIFESTYLE, THE VALUE OF KNOWLEDGE AND WISDOM THAT



CAN BE FOUND FROM CULTURES THAT HAVE NOT SEVERED THEIR CONNECTION TO THE EARTH, JUST TO NAME A FEW.

WE MAY ALSO BE WITNESSING THE “FAILURE” OF WESTERN LAW TO BE ABLE TO DEAL WITH THE SITUATIONS THAT THIS CHANGE IN THINKING WILL BRING ABOUT. WESTERN POLITICAL SYSTEMS WITH THEIR SHORT-TERM VISION SEEM TO BE UNABLE TO MEET THE CHALLENGES PRESENTED BY THIS INNER-WEAVING OF SOCIAL AND ENVIRONMENTAL CONCERNS. THE CONTINUING OBSESSION WITH EXPONENTIAL GROWTH AND CREATION OF JOBS AS A MAJOR GOVERNMENTAL FOCUS IS CLEARLY UNSUSTAINABLE IN THE LONG TERM IN THE FACE OF RISING POPULATION, LOWER CROP YIELDS, OVER FISHED OCEANS AND GLOBAL WARMING.

I BELIEVE THAT THERE IS A GROWING MOVEMENT TO BRING VALUE BACK INTO OUR LIVES IN TERMS OF UNDERSTANDING THIS INTER-CONNECTEDNESS AND WORKING TOWARDS A BETTER FUTURE FOR OUR

CHILDREN AS WELL AS AN IMPROVED LIFESTYLE FOR OURSELVES AND ALL WHO OCCUPY THIS PLANET.

INDIGENOUS LAW BASED ON RESPONSIBILITY TO THE ENVIRONMENT AND TO EACH OTHER RATHER THAN ON OWNERSHIP SEEMS TO PROVIDE A MORE EFFECTIVE MODEL IN A WORLD WHERE THE VERY HEALTH AND SURVIVAL OF OUR PLANET IS SERIOUSLY AT RISK THAN DOES CONCEPTS OF WESTERN LAW BASED ON INDIVIDUAL OWNERSHIP AND EXPLOITATION.

WHAT IS NEEDED IS A MORE COMMUNAL, OR AS MS JACKSON HAS SAID, A SUI GENERIS APPROACH TO TACKLING ISSUES OF RIGHTS AND NEEDS IN THE BIODIVERSITY DEBATE AS WELL AS GENERALLY IN TERMS OF HOW WE SUPPORT OUR ENVIRONMENT.

GOVERNMENT WILL ONLY ADDRESS LONG-TERM PROBLEMS WITH LONG-TERM SOLUTIONS WHEN THE PEOPLE THEY GOVERN REQUIRE THEM TO DO SO, AND THE GLOBALISED POWER OF LARGE CORPORATIONS

RECOGNISE THE NEED FOR SUSTAINABILITY TO PRESERVE  
THEIR OWN FUTURE.

INDIGENOUS CULTURES AND THE WISDOM THEY CONTAIN  
WILL ONLY SURVIVE WHERE THEY ARE VALUED NOT FOR  
THEIR ABILITY TO BE EXPLOITED IN DOLLAR TERMS, BUT  
FOR HOW THEY ASSIST US ALL UNDERSTAND OUR ROLE AS  
PASSENGERS ON THE GOOD SHIP PLANET EARTH.